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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

PREFERRED BUILDING SERVICES INC.
and RAFAEL ORTIZ D/B/A ORTIZ
JANITORIAL SERVICES, Joint Employers

Respondents,

and

SERVICE EMPLOYEES
INTERNATIONAL UNION LOCAL 87

Charging Party.

Case No. 20-CA-149353

**CHARGING PARTY SERVICE
EMPLOYEES INTERNATIONAL
UNION LOCAL 87'S MOTION FOR
RECONSIDERATION**

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Pursuant to NLRB Rules and Regulations §102.48(c), Charging Party Service Employees International Union Local 87 (“Local 87”) hereby moves for reconsideration of the Board’s August 28, 2018 decision dismissing the complaint in this matter. Reconsideration is warranted to correct significant errors in the Board’s application of Section 8(b)(4), which conflicts with established precedents and implements Section 8(b)(4) in a manner that violates the First Amendment.

STATEMENT OF FACTS

The relevant facts are set forth in the Administrative Law Judge’s (“ALJ’s”) Decision and Statement of the Case, which is appended to the Board’s Aug. 28, 2018 Decision and Order (“Decision”) at 5-37, and in the parties’ prior briefs to the ALJ and to the Board. Local 87 briefly summarizes the facts relevant to its Motion for Reconsideration.

The Employers’ Unfair Labor Practices

The charges in this matter arise from the concerted efforts of joint employees of two janitorial services companies to address sexual harassment and improve their wages and other working conditions. After numerous incidents of sexual harassment at the hands of the owner of one of those companies Rafael Ortiz—including incidents in which he told one employee she would make more money if she slept with him, told another employee his wife had given him permission to sleep with her as long as he used a condom, and suggested that a third had impregnated another employee who had left work due to vomiting—the employees sought the assistance of a local community organization and then a local labor union, Charging Party Local 87, to address the abusive conditions they faced. Decision at 16.

The employees and Local 87 ultimately decided to hold a demonstration in front of 55 Hawthorne, the building where the employees provided janitorial services, on October 29, 2014.

During the demonstration, the employees carried signs that read “PREFERRED BUILDING SERVICES UNFAIR” and that said at the bottom, “This is NOT a strike. It is an informational picket line. We are NOT calling for a boycott of this building. We are in a labor dispute with the cleaning contractor at this building.” *Id.* at 17.¹

The employees also handed out leaflets that informed recipients, among other things, that the workers “work for Preferred Building Services which cleans the offices of KGO Radio”; that they “get paid the San Francisco minimum wage of \$10.74 per hour” and “endure abusive and unsafe working conditions and sexual harassment”; that Preferred “does not provide paid sick days that are required by San Francisco law or pay medical bills for injuries on the job as required by workers compensation”; and that the workers were “calling on KGO radio”—one of the tenants of 55 Hawthorne—“to take corporate responsibility in ensuring that their janitors receive higher wages, dignity on the job, respect, their rights to sick pay and workers compensation, and full legal protections against sexual harassment and retaliation for asserting their rights.” *Id.* The leaflets also encouraged recipients to vote yes on a proposition to increase San Francisco’s minimum wage. *Id.*

Following the demonstration, Ortiz informed one of the workers that “she would not be working anymore” due to her participation in the demonstration. *Id.* at 21. On October 30 or 31, Ortiz threatened to discharge two workers if they did not apologize for the statements in the leaflets, and to file a lawsuit against them. *Id.* at 24-25.

On November 19, the employees who participated in the first demonstration, as well as one additional employee, held another demonstration at 55 Hawthorne. They carried signs and

¹ Preferred Building Services is the company that contracted to provide janitorial services at 55 Hawthorne. Preferred and OJS, a company owned and operated by Ortiz, jointly employed the workers who provided those services. Decision at 7-15.

handed out leaflets similar to the signs and leaflets used on October 29, although the November 19 leaflets “call[ed] on KGO radio and Cumulus Media as the major tenant to help in getting Preferred Building Services to listen to our demands and not ignore us” instead of asking KGO radio to “take corporate responsibility” for “their janitors.” *Id.* at 26.

Following the November 19 demonstration, Ortiz again threatened reprisals for the workers’ participation in the demonstration, and he subsequently terminated two of the employees for their participation in the demonstration and involvement with the union. *Id.* at 27-30. At the hearing, Ortiz testified that one worker, Joel Banegas, was fired “due to the quality of [his] work and because he never gave me the application or paperwork to work,” and that another, Balbina Mendoza, was terminated because her performance worsened after the demonstrations. *Id.* at 29. The ALJ found those arguments non-credible. *Id.* at 30.

In response to the demonstrations, Preferred Building Services terminated its contract to provide janitorial services at 55 Hawthorne and its contract with OJS, leading to the termination of the other employees who participated in the demonstrations. *Id.* at 30-33.

Procedural History

Local 87 filed an unfair labor practice charge in April 2015. The General Counsel subsequently issued a complaint alleging that OJS and Preferred Building Services had violated Section 8(a)(1) and 8(a)(3) of the Act in responding to the demonstrations, including by terminating OJS’s workers. At the hearing, Preferred Building Services contended that the workers had “lost the protection” of the NLRA “by engaging in unlawful recognitional picketing” prohibited by Section 8(b)(7)(c), and that the demonstration “may also have violated an unspecified portion of Section [] 8(b)(4) of the Act.” April 11, 2016 ALJ Decision, at 1-2. Before the submission of post-hearing briefs, the ALJ issued an order finding no merit in this

affirmative defense, explaining that “the unclean hands doctrine in equity does not operate against a charging party because Board proceedings are not for the vindication of private rights but are brought in the public interest to effectuate the purposes of the Act.” *Id.* at 2-3. Neither the General Counsel nor OJS addressed the application of Section 8(b)(4) to the workers’ demonstrations in the post-hearing briefing, while Preferred addressed Section 8(b)(4) only in a single paragraph asserting that the workers’ demonstrations *at buildings other than 55 Hawthorne* violated Section 8(b)(4). *See* Post-Hearing Brief by Resp. Preferred Buildings Services, *Inc.* at 19 (contending that “SEIU and the alleged discriminates ... engaged in unlawful secondary picketing in violation of Section 8(b)(4) of the Act at Millenium Towers, Opera Plaza and One Rincon”).

The ALJ issued her decision on September 9, 2016, finding, among other things, that OJS and Preferred Building Services jointly employed the workers; that they had violated Section 8(a)(1) by informing the demonstrating employees that they would not work anymore and threatening other reprisals following the October 29 demonstration; and that they had violated Section 8(a)(3) and Section 8(a)(1) by terminating the workers following the November 19 demonstration for having engaged in protected concerted activities. *Decision* at 16-34.

The General Counsel, OJS, and Preferred Building Services each submitted exceptions to the ALJ’s decision. In its exceptions, Preferred Building Services again did not contend that the demonstrations at 55 Hawthorne violated Section 8(b)(4). Instead, Preferred Building Services argued that Local 87 and the employees had “engaged in unlawful secondary picketing” at *other* buildings—specifically, “Millennium Towers, Opera Plaza, and One Rincon.” *Brief I/S/O Exceptions by Respondents to Administrative Law Judge’s Decision*, at 14. With respect to 55

Hawthorne, Preferred Building Services argued only that the demonstrations violated Section 8(b)(7).

On August 28, 2018, the Board issued its decision reversing the ALJ's conclusions and dismissing the General Counsel's complaint in its entirety, based on the Board's conclusion that the workers' October 29 and November 19 demonstrations at 55 Hawthorne violated Section 8(b)(4)(ii)(B). Decision at 4. The Board based its conclusion on the October 29 leaflet's statement that KGO should ensure that "their janitors" obtain better working conditions, on a meeting that occurred after the November 19 demonstration at which the workers explained their grievances to 55 Hawthorne's property manager Harvest Properties, and on the reported reactions of building tenants to the demonstration. *Id.* at 4-5.

ARGUMENT

I. Extraordinary Circumstances Warrant Rehearing.

Reconsideration of the Board's decision is justified because the Board made a "material error" by construing and applying Section 8(b)(4) of the Act in a manner that violates the First Amendment, or at the least raises serious First Amendment concerns. NLRB Rules and Regulations §102.48(c)(1).

The Board has held that extraordinary circumstances exist, and reconsideration is therefore appropriate, when the Board has made a legal error. For example, in *Detroit Newspapers*, 343 NLRB 1041 (2004), the Board granted a motion for reconsideration based on a "material error" in its prior decision—namely, the Board's treatment of the discriminatees at issue as economic strikers instead of unlawfully discharged strikers. Similarly, in *United Workers of America*, 352 NLRB 286 (2008), and a related case, the Board granted reconsideration based on its "material error" in refusing to consider whether a union had the

support of an uncoerced majority when the employer granted recognition. As explained below, in this case the Board made a number of material legal errors in concluding that the First Amendment-protected activities of the employees and Local 87, including their handbilling outside 55 Hawthorne and communication of concerns regarding Ortiz's sexual harassment to the property manager for 55 Hawthorne, took their demonstrations outside the protection of the Act, the First Amendment, and Title VII, and instead rendered them unlawful.

The constitutional dimension of the errors at issue here makes this case an even stronger candidate for reconsideration than the errors in the prior cases just discussed. Indeed, where a Board decision raises substantial constitutional concerns, the Board has granted reconsideration even where the party seeking reconsideration failed to expressly allege "material error" or "extraordinary circumstances." *See Enloe Medical Center*, 346 NLRB 854, 855-56 & nn.7-8 (2006) (granting respondent's motion for reconsideration on due process grounds where violation was not properly alleged in complaint so that respondent lacked full and fair opportunity to litigate it).

That extraordinary circumstances warrant reconsideration here is further shown by the fact that until the Board issued its decision, there was no opportunity for Local 87 or the General Counsel to explain why it violates the First Amendment to conclude that the employees engaged in prohibited secondary activity during the demonstrations at 55 Hawthorne based on the content of and reactions to their October 29 leaflets and their November 19 meeting with the property manager. Because the ALJ had *rejected* Preferred Building Services' argument that the employees had engaged in prohibited secondary conduct, Local 87 and the General Counsel had no reason to argue that a contrary conclusion would violate the First Amendment. Indeed, Preferred Building Services did not even contend that the picketing at 55 Hawthorne constituted

unlawful secondary activity until submitting its reply brief in support of its exceptions to the ALJ's decision—a brief to which neither the General Counsel nor Local 87 has ever had an opportunity to respond. *See supra* at 4-5 (post-hearing brief and brief in support of exceptions based secondary activity argument only on picketing at *other* buildings). The First Amendment problem arises from the reasoning of the Board's decision itself, and Local 87 (which the Board has now deemed to have violated federal law) deserves a full and complete opportunity to address the Board's reasoning and correct its legal error.

II. The Board Misapplied Section 8(b)(4) in a Manner that Violates Core First Amendment Principles and Calls Into Question the Constitutionality of Section 8(b)(4) Itself.

A. Section 8(b)(4) Must Be Construed Narrowly To Avoid Infringing Upon First Amendment-Protected Activity.

In relevant part, Section 8(b)(4)(ii)(B) prohibits a labor organization or its agents from “threaten[ing], coerc[ing], or restrain[ing] any person engaged in commerce or in an industry affecting commerce, where ... an object thereof is ... forcing or requiring any person ... to cease doing business with any other person.” Section 8(b)(4) was prompted by “[c]ongressional concern over the involvement of third parties in labor disputes not their own,” and in particular by “secondary boycotts,” which involve “pressure brought to bear, not upon the employer who alone is a party (to a dispute), but upon some third party who has no concern in it, with the objective of forcing the third party to bring pressure on the employer to agree to the union’s demands.” *NLRB v. Operating Engineers Local 825 (Burns and Roe Inc.)*, 400 U.S. 297, 302-03 (1971).

Although Section 8(b)(4) to some extent reflects a general congressional concern regarding secondary activity, the Supreme Court and this Board have repeatedly emphasized that

it must be construed narrowly and in careful accordance with its statutory text, for two separate reasons.

First, Section 8(b)(4) was “the result of conflict and compromise” and should not be interpreted in a manner that would “find[] by construction a broad policy against secondary boycotts as such when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law.” *Carpenters Local 1976 v. NLRB*, 357 U.S. 93, 100 (1958). Section 8(b)(4) “describes and condemns” only “specific union conduct directed to specific objectives.” *Id.* at 98. Accordingly, “[a] boycott voluntarily engaged in by a secondary employer for his own business reasons ... is not covered by the statute. Likewise, a union is free to approach an employer to persuade him to engage in a boycott, so long as it refrains from the specifically prohibited means of coercion through inducement of employees.” *Id.* at 98-99.

Second, construing Section 8(b)(4) broadly presents “serious constitutional questions.” *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 588 (1988). “[A] broad ban against peaceful picketing might collide with the guarantees of the First Amendment.” *NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760*, 377 U.S. 58, 63 (1964). To avoid such constitutional problems, the Supreme Court has instructed that Section 8(b)(4) should be construed to apply to First Amendment-protected expression only where its text or legislative history provide the “clearest indication” that Congress intended to prohibit the conduct at issue. *DeBartolo*, 485 U.S. at 577; *see also Carpenters Local 1506*, 355 NLRB 797, 797 (2010) (construing Section 8(b)(4)(B)(ii) in manner consistent with Board’s obligation “to seek to avoid construing the Act in a manner that would create a serious constitutional question”); *UFCW Local 1996*, 336 NLRB 421, 427 (2001) (adopting

interpretation of Section 8(b)(4)(B) that “has the virtue of averting the need to decide the First Amendment issues raised by the Respondent”).

As explained below, the Board failed to heed these principles in concluding that the employee demonstrations underlying the General Counsel’s complaint violated Section 8(b)(4). Although the demonstrations included “picketing” to the extent that the demonstrators carried placards and walked in circles, that “picketing” did not involve any of the elements of confrontation or coercion that might permit its regulation notwithstanding its expressive content.² Further, even if the picketing were coercive for the purposes of Section 8(b)(4), it complied with the Board’s standard for ensuring non-interference with the rights of secondary employers and focused solely on the primary employers (OJS and Preferred Building Services).

Far from acknowledging the important First Amendment principles that must guide the Board’s construction of Section 8(b)(4), the Board based its decision that the employees’ demonstrations regarding Ortiz’s sexual harassment and other problems they faced at work were unlawful on other, non-picketing forms of fully First Amendment-protected speech engaged in by the employees, including the content of their leaflets, their statements during a post-demonstration meeting with the property manager, and the response of the public and the building’s tenants to their message. In all of these respects, the Board construed Section 8(b)(4)

² The ALJ assumed that the picketing at issue here was coercive simply because the workers and SEIU Local 87 walked in circles in front of 55 Hawthorne. Decision at 18. Because the ALJ nonetheless agreed with the General Counsel that this “picketing” was lawful, neither the General Counsel nor Local 87 had any reason to challenge this finding when submitting their exceptions to the ALJ’s decision. Further, because Preferred did not contend that the picketing *at 55 Hawthorne* was unlawful secondary activity until submitting its reply brief in support of its exceptions to the ALJ’s decision, neither the General Counsel nor Local 87 has ever had any opportunity to explain why that picketing is not covered by Section 8(b)(4).

in a manner that disregards its own precedents and squarely conflicts with the First Amendment rights of the employees and Local 87.

B. The Employees' "Picketing" Was Non-Coercive, and Construing Section 8(b)(4) To Apply to Their Picketing Violates Core First Amendment Principles.

Picketing by a union involves expressive activity fully protected by the First Amendment. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982) (nonviolent picketing in support of boycott of certain merchants was "a form of speech or conduct ... entitled to protection under the First and Fourteenth Amendments"); *Thornhill v. Alabama*, 310 U.S. 88, 103-05 (1940) (invalidating prohibition on picketing that infringed upon "the effective exercise of the right to discuss freely industrial relations"). In an effort to construe the Act in a manner that could survive constitutional scrutiny, the Board has long recognized that union picketing involves the kind of threat, restraint, or coercion governed by Section 8(b)(4) only if it creates a "confrontation between the picketers and those entering the worksite." *Carpenters Local 1506*, 355 NLRB at 802; *see also id.* ("This element of confrontation has long been central to our conception of picketing for purposes of the Act's prohibitions."); *NLRB v. Furniture Workers*, 337 F.2d 936, 940 (2d Cir. 1964) (explaining that "picketing" requires "a confrontation in some form between union members and the employees, customers, or suppliers who are trying to enter the employer's premises" and "an element of intimidation resulting from the physical presence of the pickets or the heritage of the union line tainted with bloodshed and violence").

Accordingly, "not all patrolling constitutes picketing in the statutory meaning of that term." *Alden Press, Inc.*, 151 NLRB 1666, 1669 (1965); *see also id.* ("Although the means used by Respondents to publicize their dispute at these places entailed patrolling and the carrying of placards, this circumstance alone does not *per se* establish that 'picketing' in the sense intended

by Congress was involved.”). The Board must “take care not to define the category of proscribed picketing more broadly than clearly intended by Congress.” *Carpenters Local 1506*, 355 NLRB at 802.

This narrow construction is necessary both because Section 8(b)(4) applies only to coercive conduct, and because “[t]he consequences of categorizing peaceful expressive activity as proscribed picketing are severe.” *Carpenters Local 1506*, 355 NLRB at 801. Not only does such categorization render peaceful expressive activity at purely secondary locations “unlawful without any showing of actual threats, coercion or restraint,” but it also makes the demonstration at issue an unfair labor practice with respect to which “the Board is required, upon a finding of ‘reasonable cause’ to believe such activity has occurred, to go into federal district court and seek a prior restraint against the continuation of the activity,” and exposes the labor organization “to suit in Federal court where damages can be awarded.” *Id.* at 801-02.

There is no evidence that the demonstrations at issue here created the kind of threatened confrontation or intimidation necessary to bring them within the scope of Section 8(b)(4) or to permit their prohibition notwithstanding the First Amendment. Although the Supreme Court has held that Congress may constitutionally outlaw picketing that encourages consumers to boycott a secondary employer’s entire business, *see NLRB v. Retail Store Employees Union Local 1001*, 447 U.S. 607, 616 (1980), that holding rested on the Court’s apparent belief that such picketing creates an inherent likelihood of intimidation or confrontation between the picketers calling for a boycott of the premises and the individuals seeking to enter the premises. *Id.* at 616.³ Here, the

³ Under the more recent First Amendment precedents regarding content-based speech restrictions discussed below, it is highly doubtful that *Retail Store Employees* remains good law with respect to the First Amendment question addressed therein. *See, e.g., Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2227 (2015) (content-based discrimination exists “if a law applies to particular speech because of the topic discussed or the idea or message expressed”); *Snyder v.*

picketers' signs specifically stated that they were "NOT calling for a boycott" of 55 Hawthorne. Indeed, far from suggesting that anyone should refrain from entering 55 Hawthorne, the workers' purpose of informing the building's major tenant of their concerns and requesting its assistance would be served only if individuals who encountered the demonstration *entered* the building and then conveyed the workers' concerns to KGO management.

The Board's reliance on *Burns and Roe* is similarly misplaced, because in that case the union engaged in a strike against neutral employers that shut down an entire project in order to coerce the neutral employers into assisting the union in its efforts with respect to the primary employer with whom it had a labor dispute. *Burns and Roe*, 400 U.S. at 407. Here, by contrast the workers engaged in a peaceful protest that had no discernible impact on the business of any neutral employer.

Because the "picketing" at issue here "was not designed to dissuade customers or others from patronizing the establishments in the area being paraded, nor was it intended to halt deliveries or to cause employees to refuse to perform services, and it did not in fact produce such results," it is fully protected by the First Amendment, the Act, and Title VII, and is indistinguishable from other forms of expressive activity that the Supreme Court and the Board have recognized fall outside the scope of Section 8(b)(4). *Alden Press*, 151 NLRB at 1669; *cf. Carpenters Local 1506*, 355 NLRB at 802 (display of stationary banner not prohibited by Section 8(b)(4)); *Overstreet v. Carpenters Local 1506*, 409 F.3d 1199, 1216 (9th Cir. 2005) (same); *DeBartolo*, 485 U.S. at 588 (handbilling not prohibited by Section 8(b)(4)); *Fruit and Vegetable Packers & Warehouseman Local 760*, 377 U.S. at 72 (peaceful picketing targeting

Phelps, 562 U.S. 443, 457-58 (2011) (First Amendment protected church's "upsetting" and "contempt[uous]" picketing).

sale of particular product not prohibited by Section 8(b)(4)); *Sheet Metal Workers Local 15 v. NLRB*, 491 F.3d 429 (D.C. Cir. 2007) (distribution of leaflets and holding of mock funeral not coercive).

If the Board construes Section 8(b)(4) to apply to the “picketing” at issue here or to all forms of “picketing,” regardless of the absence of any evidence that the picketing actually coerced, restrained, or threatened anyone, Section 8(b)(4) would be inconsistent with modern First Amendment authority and unconstitutional. By prohibiting unions from picketing in order to force or require “secondary” employers to cease doing business with another employer, while permitting union picketing for other purposes and permitting groups and individuals other than labor organizations to picket for any purpose whatsoever (including as part of a secondary boycott), Section 8(b)(4) creates a content- and speaker-based restriction on First Amendment-protected expressive activity. *See Claiborne Hardware Co.*, 458 U.S. at 907 (First Amendment protected NAACP’s nonviolent picketing in support of boycott of certain merchants); *Thornhill*, 310 U.S. at 103-05 (First Amendment protected union’s picketing); *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2227 (2015) (“Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.”); *see also Carpenters Local 1506*, 355 NLRB at 797 (“Governmental regulation of nonviolent speech ... implicates the core protections of the First Amendment.”).

Such restrictions on expressive activity are subject to strict scrutiny and are constitutional only if they are narrowly tailored to compelling government interests. *Reed*, 135 S.Ct. at 2227. With respect to the non-coercive picketing at issue here, Section 8(b)(4) cannot satisfy that standard because the government has no substantial interest in restricting such peaceful expressive activity, and any interest it might have in protecting neutral employers from coercion

can be achieved through means far less restrictive of First Amendment-protected expression. *See, e.g., Snyder v. Phelps*, 562 U.S. 443, 457-58 (2011) (First Amendment protected church’s picketing outside of soldier’s funeral). The mere fact that the employees’ picketing might convince building tenants and the public that its complaints about sexual harassment and other abusive conditions at 55 Hawthorne have merit and deserve to be addressed provides no basis for restricting that expressive activity. *See, e.g., Sorrell v. IMS Health Inc.*, 564 U.S. 552, 576 (2011) (“[T]he fear that speech might persuade provides no lawful basis for quieting it.”).

C. The Board Erred in Relying Upon the Leaflet’s Use of the Word “Their” To Hold that the Workers’ Conduct Was Unprotected and Did Not Comply with the *Moore Dry Dock* Criteria.

Even if the “picketing” here could be considered “coercive” for the purposes of Section 8(b)(4), the “picketing” did not have an unlawful secondary object, because it was not designed to “force or require” any secondary employer to cease doing business with OJS or Preferred Building Services—the “primary” employers involved in the workers’ dispute. Instead, the employees, in response to “abhorrent” harassment by a subcontractor whom they believed to be a foreman working for Preferred Building Services, Decision at 5 n.21, engaged in primary picketing of their employers and reasonably publicized their complaints in order to seek support from the tenants and the building manager. Such primary activity is protected even though it may seriously affect neutral third parties. *See, e.g., Steelworkers v. NLRB*, 376 US 492 (1964); *Electrical Workers v. NLRB*, 366 US 667 (1961).

Where picketing takes place at a location that includes both primary and secondary employers, this Board applies the standard announced in *Moore Dry Dock Co.*, 92 NLRB 547, 549 (1950), to determine whether the picketing is properly targeted at the primary employers, or whether it unlawfully targets a secondary employer. Under that standard, picketing is

presumptively lawful if “(a) [t]he picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer’s premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer.” *Id.* at 549.

There is no question that the workers’ demonstration satisfied the first three *Moore Dry Dock* criteria, and the Board did not conclude otherwise. *See* Decision at 19. The fourth requirement was also easily satisfied, and the Board erred in concluding otherwise. The workers’ signs said “PREFERRED BUILDING SERVICES UNFAIR” and expressly stated that the workers were “in a labor dispute with the cleaning contractor at [55 Hawthorne].” *Id.* at 17. The leaflets that the workers handed out during the demonstration likewise stated that the employees “work for Preferred Building Services.” *Id.*

Notwithstanding the workers’ express statement that their dispute was “with the cleaning contractor” alone, the Board concluded that the fourth *Moore Dry Dock* requirement was not satisfied because the workers’ October 29 leaflets stated that they were “calling on KGO radio to take corporate responsibility in ensuring that their janitors receive” improved working conditions. Decision at 2, 4. The Board’s reliance on the workers’ use of the word “their” in the leaflet was wrong for multiple reasons.

First, the leaflet said nothing that would undermine the workers’ straightforward disclaimer that they worked for Preferred Building Services and that their labor dispute was with that cleaning contractor. Because the workers provided janitorial services to KGO’s offices, they could accurately be described as KGO’s janitors, and describing them in that manner said nothing whatsoever about their employment status. The Board has previously rejected the

contention that Section 8(b)(4) requires unions to phrase signs and other materials in a manner that perfectly captures the legal distinction between primary and secondary community employers. *See Carpenters Local 1506*, 355 NLRB at 810-11.

Second, leaflets containing the phrase “their janitors” were distributed only at the October 29 demonstration, but the workers were all terminated in response to the November 19 demonstration, at which the leaflets stated that the workers were “calling on KGO radio and Cumulus Media as the major tenant to help in getting Preferred Building Services to listen to our demands and not ignore us.” Decision at 26. The October 29 leaflets cannot render unprotected the much later demonstration that actually led to the workers’ terminations.

Third, and most important, nothing in the language cited by the panel decision suggests that the picket had the purpose of *forcing* or *requiring* KGO radio to cease doing business with Preferred Building Services, as would be necessary for KGO radio to be an unlawful target of secondary activity for the purposes of Section 8(b)(4). To be certain, the leaflet cited by the panel *could* have asked customers to support a boycott of Preferred Building Services or the tenants of 55 Hawthorne, *see DeBartolo*, 485 U.S. at 588, or it could have stated that the employees would continue to picket until their demands were met, *see, e.g., Plumbers Local 32 v. NLRB*, 912 F.2d 1108 (9th Cir. 1990); *Sheet Metal Workers Local 15*, 491 F.3d at 435-36 (same). The employees’ actual leaflet, however, did neither of those entirely lawful things. Instead, it merely encouraged KGO radio to take steps to improve the working conditions of the individuals who provided janitorial services on its premises, while being accompanied by signs stating that the employees were “NOT calling for a boycott of this building.” Decision at 17.⁴

⁴ There is no reason to conclude that KGO would have preferred to remain in the dark regarding allegations of “abhorrent” sexual harassment within its workplace. Decision at 5 n.21.

That the employees' demonstration was not coercive with respect to KGO is even more apparent from the fact that KGO is a radio station that reaches its customers by broadcasting a signal over the airwaves, rather than by relying upon customers' entry into its premises to purchase its goods or services. *See Alden Press*, 151 NLRB at 1669 (finding no coercion where union's activity "was not designed to dissuade customers or others from patronizing the establishments in the area being paraded" or "to halt deliveries or to cause employees to refuse to perform services").

The workers' request that KGO accept "corporate responsibility" for improving the working conditions of the individuals who provide janitorial services in its offices and who asserted that they were suffering sexual harassment while working in the building where KGO was the major tenant, unaccompanied by any effort to *force* or *require* KGO to take action, is fully protected by the First Amendment, the Act, and Title VII, and entirely lawful under Section 8(b)(4). As this Board and the Supreme Court have emphasized, just as individuals and groups other than labor organizations have the First Amendment right to seek support for their own boycotts, the First Amendment protects the freedom of workers and unions to ask others—including secondary employers—to boycott employers with whom they have a primary labor dispute. *See, e.g., NLRB v. Servette, Inc.*, 377 U.S. 46, 54 (1964) (Section 8(b)(4) does not apply to union's request that managers of secondary employer "exercise their delegated authority by making a business judgment to cease dealing with the primary employer"); *cf. Claiborne Hardware*, 458 U.S. at 907 (NAACP-organized boycott of merchants constitutionally protected). "Activity intended only to educate consumers, secondary employers, or secondary employees,

It is just as likely that KGO wanted to learn of such allegations so that it could maintain a sexual harassment-free workplace regardless of the employers of the individuals being harassed.

and even prompt them to action—so long as the action is not a cessation of work by the secondary employees—is lawful.” *Southwest Regional Council of Carpenters*, 356 NLRB 613, 615 (2011).

By relying upon the leaflet’s text to conclude that the workers’ demonstrations violated Section 8(b)(4), the Board’s decision construes the Act in a manner that punishes employees for engaging in First Amendment-protected activity. Applied in this manner, Section 8(b)(4) would be constitutional only if it could survive heightened judicial scrutiny—which it certainly cannot, given that the government has no substantial interest, let alone a compelling one, in restricting speech like that in the employees’ leaflet. *See, e.g., Sorrell*, 564 U.S. at 565-67 (heightened scrutiny applies where government “impose[s] a specific, content-based burden on protected expression”). Rather than relying upon a strained reading of the leaflet’s text to deprive the workers’ demonstrations of protected status, the Board should have construed Section 8(b)(4) narrowly in light of the substantial constitutional concerns and held that the content of the employees’ First Amendment-protected leafletting in no way undermined their clear statement that their labor dispute was with Preferred Building Services.

D. The Board Erred in Relying Upon the November 19 Meeting and Upon Tenants’ Responses to the Demonstrations To Hold that the Workers’ Conduct Was Unprotected.

In addition to citing the October 29 leaflet in support of its conclusion that the workers’ demonstration involved unlawful secondary activity, the Board based its conclusion on a meeting between the workers and the property manager, Harvest Properties, that occurred after the November 19 demonstration. But as with the leaflet, that meeting involved core First Amendment-protected activity by the workers and Local 87, and cannot provide a basis for deeming the workers’ demonstrations unlawful.

First, the Board's reliance on the November 19 meeting was misplaced because nothing about the workers' demonstration supports a conclusion that it was intended to force or require Harvest Properties to do anything at all. As any responsible property manager would do after learning that employees may have suffered sexual harassment while working on the property, "Harvest Properties building manager Maxon ... sought an investigation into the allegations on the picket signs of his own volition." Decision at 19.⁵ *None* of the signs or leaflets handed out at either demonstration made any reference whatsoever to Harvest Properties, and (even more so than with KGO) Harvest did not operate the kind of business that depends upon customer or supplier traffic, such that an interruption by picketing could, as a practical matter, "force or require" the business to accede to the workers' demands. *Alden Press*, 151 NLRB at 1669 (finding no potentially unlawful "picketing" where union's conduct "was not designed to dissuade customers or others from patronizing the establishments in the area being paraded, nor was it intended to halt deliveries or to cause employees to refuse to perform services, and it did not in fact produce such results").

Indeed, because the meeting with Harvest Properties did not occur until *after* the two demonstrations at issue, statements made during the meeting regarding what might happen in the future provided no evidence whatsoever regarding demonstrations that had already occurred. The facts show that the workers' demonstrations did not lead Harvest Properties to cease doing business with Preferred Building Services or OJS. Harvest had begun searching for a unionized contractor "[e]ither *before* or around the time of the picketing," and there was "no evidence to connect this search to the picketing," and "Preferred, not Harvest, cancelled [Preferred's]

⁵ Preferred Building Services did not take exception to this finding by the ALJ.

contract” to provide janitorial services at 55 Hawthorne. Decision at 5, 19 n.39 (emphasis added).

In any event, the workers’ meeting with Harvest Properties involved core First Amendment-protected activities that cannot provide the basis for finding a violation of Section 8(b)(4). As explained already, the First Amendment and the Act protect, and Section 8(b)(4) does not outlaw, a union’s non-coercive request that a secondary employer “mak[e] a business judgment to cease dealing with the primary employer.” *Servette*, 377 U.S. at 54; *Southwest Regional Council of Carpenters*, 356 NLRB at 615 (Section 8(b)(4) does not apply to a union’s efforts “to educate consumers, secondary employers, or secondary employees, and even prompt them to action”). The union and the workers did no more than this during the November 19 meeting. The Board’s decision relied heavily on the fact that the employees informed Harvest Properties that they would continue demonstrating if their concerns remained unaddressed, but Section 8(b)(4) does not prohibit unions from informing secondary employers of the reasons why they are picketing a primary employer and stating that they will continue picketing at that common site until their demands are satisfied. *Servette*, 377 U.S. at 57 (union’s “threat to engage in protected conduct” was “itself protected”); *Plumbers Local 32*, 912 F.2d at 1110 (union’s threat to secondary employer to picket common site was lawful where there was no evidence that the picketing would be “conducted in an unlawful manner”); *Sheet Metal Workers Local 15*, 491 F.3d at 435-36 (same).

Because unions may ask secondary employers to honor their requests with respect to a primary employer so long as they do so non-coercively, the mere fact that the workers were “happy” with Harvest Properties’ responses at the meeting does not establish that their demonstrations were unlawful. *Sorrell*, 564 U.S. at 576 (“[T]he fear that speech might persuade

provides no lawful basis for quieting it.”). For the same reason, the Board erred by relying on tenants’ reactions to the demonstrations as support for its conclusion that the workers’ demonstrations were unlawful. As the Supreme Court has made clear, it is a “basic First Amendment principle[]” that “[s]peech remains protected even when it may ‘stir people to action,’ ‘move them to tears,’ or ‘inflict great pain.’” *Id.* (citing *Snyder*, 562 U.S. at 460-61). It is not at all surprising that the employees’ complaints regarding sexual harassment and other unlawful working conditions would upset both the public and the tenants and manager of the building where the employees provided janitorial services—who likely knew and interacted with those employees—but the mere fact that such individuals were moved by the employees’ message cannot provide a basis for finding their expressive activities unlawful.

In relying on the October 29 leaflet, the November 19 meeting with Harvest Properties, and the responses of tenants and the public, the Board’s decision treats as unlawful coercion the employees’ mere act of communicating complaints about Ortiz and requests for assistance to the tenants and manager of the building where they provided services under Ortiz’s supervision. To the extent these actions “pressured” KGO or Harvest Properties to act, they did so only by virtue of the power of the employees’ message regarding sexual harassment and the other abusive conditions that the employees were conveying. Rather than acknowledging the narrow scope of Section 8(b)(4) and focusing upon the specific “prohibited means of coercion” covered by Section 8(b)(4), the Board’s decision treats that section as establishing “a broad policy against secondary [activity].” *Carpenters Local 1976*, 357 U.S. at 99-100. This construction and application of Section 8(b)(4) brings it into direct conflict with the First Amendment, and reconsideration should be granted to correct that significant legal error.

E. The Board Erred in Relying Upon the Employer’s Post Hoc Justifications To Hold that the Workers’ Conduct Was Unprotected.

Finally, even if the Board were correct in concluding that the workers who were terminated engaged in unlawful secondary activity, the Board erred in treating that conclusion as dispositive of the issues presented. There can be no question that at least *some* of the terminated employees’ activity was protected by the Act. *See supra* at 1-3 (noting joint communication of complaints about sexual harassment); Decision at 30 (referencing terminated employees’ “protected, concerted activity by joining together with other employees and with SFCLW and SEIU Local 87 to improve their wages, hours, and working conditions”). When, as here, the evidence shows that an employee’s protected activity played a part in the employer’s decision to discharge him—in other words, that there is “both a ‘good’ and a ‘bad’ reason for the employer’s action”—the employer has the burden to prove that the employee would have been terminated even if he had not engaged in the protected conduct. *Wright Line*, 251 NLRB 1083, 1084, 1089 (1980); *see also NLRB v. Transportation Mgt. Corp.*, 462 U.S. 393, 395 (1983). The Board failed to analyze the terminations at issue here under the *Wright Line* framework or to require the employer to make this required showing.

This is particularly true in the cases of Banegas and Mendoza. At the hearing, Ortiz did not assert that he fired these employees for their participation in unlawful secondary picketing. Instead, Ortiz continued to adhere to the false explanation that he fired Banegas and Mendoza because of poor work performance (and in Banegas’ case, because he never submitted certain paperwork). Decision at 28-30. The ALJ found that Ortiz’s testimony was not credible and that this explanation was false, and instead credited testimony that Ortiz had admitted, at the time of the terminations, that he fired the employees “because they wanted a union” *Id.* at 28; *see also id.* at 30. The Board has long held that this type of false explanation supports a finding that

the true reason for a discharge was unlawful. *See, e.g., Apex Linen Service, Inc.*, 366 NLRB No. 12, slip op. at 12 (2018). Thus, even if the Board’s determination that the employees engaged in unlawful secondary activity were correct, the Board should nonetheless have applied *Wright Line* to determine whether that activity—as opposed to their other concerted, protected activity—motivated the terminations. *See In re Faurecia Exhaust Sys., Inc.*, 355 NLRB 621, 622 (2010) (holding that even if employee had engaged in unprotected conduct, employer’s reliance on that conduct was pretext and termination was actually motivated by protected union solicitation)

Moreover, when, as here, an employer asserts a *post hoc* justification for an employee’s termination, even the *Wright Line* defense may not be available. *See Yellow Freight Sys., Inc.*, 313 NLRB 309, 309-10 (1993); Decision at 29 (rejecting Ortiz’s pretextual explanations and instead crediting employee’s testimony that Ortiz told him he was fired “because you’re making noise and you’re making the company [] look bad”). Tellingly, OJS never contended that the workers were terminated because of the unlawful nature of their activity.

Reconsideration should be granted for these reasons as well.

CONCLUSION

The Board’s construction and application of Section 8(b)(4) conflicts with the Board’s own precedents and with the First Amendment. Reconsideration should be granted to resolve that conflict and make it clear that the employees and Local 87 cannot be punished for exercising First Amendment-, NLRA-, and Title VII-protected rights to communicate their concerns regarding sexual harassment and other abusive working conditions to the public and to the tenants and manager of the building where they provided janitorial services.

Dated: September 25, 2018

Respectfully submitted,

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PROOF OF SERVICE

CASE: Preferred Building Services Inc. and Rafael Ortiz D/B/A Ortiz Janitorial Services,
Joint Employers *and* Service Employees International Union Local 87

CASE NO: 20-CA-149353

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On September 25, 2018, I caused the following documents to be served on the parties, through their attorneys of record, by (1) emailing the document listed to the persons at the email addresses listed below:

CHARGING PARTY SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 87'S MOTION FOR RECONSIDERATION

Within a reasonable time after the transmission, no electronic message or other indication that the transmission was unsuccessful was received.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this September 25, 2018 at San Francisco, California.

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